

FILED

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JUL 02 2018

Nos. 357341, 358496

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

EGP INVESTMENTS, LLC, a Washington Limited Liability
Company,

Plaintiff / Respondent,



v.

MARVIN R. FREAR JR, individually, and the marital
community comprised of MARVIN R. FREAR and JANE DOE
FREAR, husband and wife,

Defendants / Appellants.

On Appeal from the Superior Court of Spokane County
Hon. Michael P. Price
Superior Court Docket Number 11-2-04025-3

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE ISSUES

1. Have the Frears proven by clear and convincing evidence that service upon Mr. Frear was invalid? Answer: No.

2. Did the trial court err when it denied the Frears' motion to vacate the judgment? Answer: No.

3. Should the Court affirm the trial court's order denying the Frears' motion to vacate the judgment and award the Respondent its reasonable attorneys' fees and costs incurred on appeal? Answer: Yes.

II. STATEMENT OF THE CASE

This case arises from a default judgment on a Chase Bank USA, N.A. revolving charge account that Plaintiff / Respondent EGP Investments, LLC ("EGP") obtained against Defendant/Appellant Marvin R. Frear Jr. on July 25, 2011 in Spokane County District Court (the "**Judgment**"). CP 1; CP 135. EGP subsequently transferred the Judgment to the Spokane County Superior Court. CP 1-5.

The Frears filed their motion to vacate the Judgment in superior court on October 10, 2017. CP 5. The evidentiary basis for this motion was the Declarations of David Nolan, Laurie Frear, Marvin Frear, and the files and records of the superior court. CP 10 - CP 27. The Frears argued the Judgment should be vacated under Civil Rule 60(b)(5) because even though the declaration of service filed on May 29, 2011 stated David

Nolan was a resident at the place of service and was served with EGP's summons and complaint at the Frears' house of usual abode, Mr. Nolan never lived at that address, accepted pleadings there, or is 5'9" like the person described in the declaration of service. CP 10 - CP 27.

EGP opposed the Frears' motion to vacate with a memorandum in opposition to this motion and three supporting declarations. CP 34 – CP 37. EGP began its opposition by noting that its original declaration of service concerning Mr. Frear that was filed in Spokane County District Court states process server Stanley Rhodes served EGP's summons and complaint upon a 150 pound white 5'9" 30 year old male with brown hair who was identified as Dave Nolan, roommate, on May 29, 2011 at 3214 E. 23rd, Spokane, Washington. CP 34 – CP 35. A copy of this declaration of service is in the record at Clerk's Papers 79.

EGP also noted in its opposition that in August of 2017, EGP informed process server Stanley Rhodes that Mr. Frear claimed he was never served with EGP's summons and complaint. CP 80. Mr. Rhodes then reviewed the foresaid declaration of service that he previously prepared and returned to the address listed therein to see if he could get a look at Mr. Frear and/or the person identified in the declaration of service. CP 80. On or about August 30, 2017, Mr. Rhodes drove by the address listed in the declaration of service and saw Marvin Frear and his wife

Laurie Frear unloading groceries from a vehicle and taking these groceries into the home located at the address in the declaration of service. CP 80. Mr. Rhodes got a good look at Mr. Frear at that time, and Mr. Frear bears a very strong resemblance to the gentleman described in the aforesaid declaration of service. CP 81. Mr. Rhodes subsequently testified in a declaration submitted in opposition to the Frears' motion to vacate that he therefore believes he did in fact serve Mr. Frear himself with EGP's summons and complaint as described in the declaration of service, and that Mr. Frear lied to him at the time of service when he identified himself as Dave Nolan, a roommate of his. CP 81.

The trial court was also made aware that the record reflects Mr. Frear's date of birth is September 9, 1977. CP 44. Thus, Mr. Frear was thirty-three (33) years old at the time of service. CP 44. Again, the declaration of service states Mr. Rhodes effectuated service upon a thirty (30) year old male.

As for Dave Nolan, who submitted a sworn declaration in support of the Frears' motion to vacate, EGP explained to the trial court that the record reflects Mr. Nolan was found guilty of theft on three (3) different occasions in 2003. CP 44. EGP argued to the trial judge that these crimes are crimes that involved dishonesty within the meaning of Evidence Rule

609, and that Mr. Nolan's testimony in his declaration should therefore not be taken entirely at face value. CP 39.¹

As for Mr. and Mrs. Frear, the record reflects that even though they have known about EGP's Judgment for years, they nevertheless waited for years before they moved to vacate the Judgment. CP 41. For example, EGP delivered a writ of garnishment to Bank of America in May of 2012 in the hope of obtaining funds from Mr. Frear's bank account. CP 43 – CP 44. In connection with this garnishment proceeding, EGP mailed certain garnishment materials to the Frears' home address via certified mail. CP 44. Laurie Frear signed for these materials on or about May 8, 2012. CP 44. A copy of the certified mail return receipt that reflects such along with the declaration of mailing regarding the transmittal of the garnishment pleadings to the Frear home is in the record at Clerk's Papers 49 – 51. Neither Mr. Frear nor Mrs. Frear ever contacted EGP in response to the aforesaid garnishment proceeding or to claim Mr. Frear was never served with EGP's summons and complaint. CP 44.

The trial court was also aware that Mr. Frear telephoned EGP on September 23, 2016 to ask about the nature of the debt that led to EGP's

¹ ER 609(a)(2) provides a witness's credibility can be attacked if the witness has been convicted of a crime and the crime involved dishonesty or false statement. Evidence of a conviction under this rule can be admissible more than ten (10) years after the conviction if the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect.

Judgment and the balance of the Judgment. CP 44. EGP answered these questions at that time. CP 44. Mr. Frear then thanked EGP and hung up. *Id.* CP 44. A copy of a printout of EGP's Case notes software that reflects this exchange is in the record at Clerk's Papers 53.

In response to EGP's opposition to the motion to vacate, Mr. and Mrs. Frear submitted supplemental declarations. CP 88 – CP 92. Mrs. Frear testified in her supplemental declaration that she (1) does not dispute that she received a certified mailing from EGP in May 2012; (2) she was caring for an infant child and two other young children at that time while also working at a bank; (3) she and her husband were also dealing with other civil legal issues at the time, along with family and medical issues; and (4) it did not occur to her that the certified mail was related to a lawsuit she “knew nothing about[,]” and that she assumed it was related to another lawsuit and that it was being handled, among other things. CP 91 – CP 92.

Mr. Frear testified in his supplemental declaration that, among other things, he was never served in this action, process server Stanley Rhodes is a liar who submitted a “slandorous declaration[,]” that Mr. Frear told EGP in September 2016 that this was the first time he knew about the lawsuit, and that EGP's “self-serving notes fail to include that portion of our conversation in the account notes.” CP 89. Mr. Frear did not testify in

his supplemental declaration as to his date of birth or age at the time of service or his height or physical description, nor did he provide a copy of his driver's license or other valid photo identification to show he does not meet the physical description of the gentleman described in the declaration of service that is identified therein as Dave Nolan, roommate. CP 88 – CP 89.

EGP responded to the Frears' supplemental declarations by filing the reply declaration of Carma Figueroa. CP 101. In her declaration, Ms. Figueroa testified she was the one who spoke with Mr. Frear about his account with EGP on September 23, 2016, and Mr. Frear did not tell her during their conversation that this was the first he knew about the lawsuit. CP 101 – CP 102. Ms. Figueroa further testified that had Mr. Frear actually told her that he was not aware of the lawsuit until then, she would have logged that important detail in EGP's Case notes software and perhaps EGP's paper file as well. CP 102. Ms. Figueroa also testified she is the one who typed EGP's Case notes entry concerning Mr. Frear's conversation with her on September 23, 2016, and the Case notes entry accurately and correctly reflects the full extent of their conversation on that date. CP 102. Ms. Figueroa then reiterated that Mr. Frear never stated during their conversation that this was the first he knew about the lawsuit. CP 102. Had Mr. Frear done so, Ms. Figueroa testified she

would have pulled EGP's paper file and gone into more detail with him. CP 102. Ms. Figueroa also declared she assumed Mr. Frear called EGP because he wanted his account information to file for bankruptcy. CP 102.

On October 25, 2017, the Frears filed their reply in support of their motion to vacate the Judgment and a motion to strike the declaration of Brian Fair, EGP's manager. CP 93; CP 98. In their motion to strike, the Frears argued Exhibit C to Mr. Fair's declaration, which references the fact that Mr. Nolan was found guilty of theft on three (3) different occasions in 2003, is essentially a credit report for Mr. Nolan that is a wholly unauthenticated hearsay document that does not qualify as a business record and Mr. Fair's declaration is not based on personal knowledge and is rife with inadmissible hearsay. CP 98 – CP 100. The Frears also argued the search report concerning Mr. Nolan was "illegally obtained" under the federal Fair Credit Reporting Act (the "FCRA") because it was not obtained for "permissible purposes" under that statute. CP 98 – CP 100.

EGP subsequently filed an opposition to the motion to strike, in which it explained Mr. Fair's declaration is admissible because Mr. Fair testified he is a custodian of records for EGP, and he is therefore able to testify about EGP's business records and the contents of them. CP 107 – CP 110. EGP also explained why the Nolan search report is admissible as

a third-party business record and why said report is also admissible as a Market Report or Commercial Publication under ER 803(a)(17). CP 107 – CP 110. EGP also noted that some courts have held for decades that credit reports are admissible as business records, and that because the Frears themselves argued the Nolan search report is the same as a credit report, the Frears cannot fairly say this report is inadmissible under the applicable case law EGP cited. CP 107 – CP 110. EGP also explained it did not violate the FCRA by pulling a search report on Mr. Nolan because this report is not a “consumer report” as defined by the FCRA because EGP did not obtain the report in order to consider whether Mr. Nolan was eligible for credit or insurance or employment. CP 107 – CP 110. EGP also noted that even if the Nolan search report could somehow be rightly called a “consumer report” under the FCRA, EGP had a “permissible purpose” under the FCRA for obtaining this report given that Mr. Nolan submitted a declaration in support of the motion to vacate the Judgment. CP 107 – CP 110. EGP then cited federal cases that hold defendants in cases alleging FCRA violations are entitled to pull consumer reports to prepare a defense to claims of FCRA violations. CP 109 – CP 110.

After hearing argument from counsel, Spokane County Superior Court Judge Michael P. Price denied the Frears’ motion to vacate EGP’s

Judgment on November 6, 2017.² In doing so, the trial court first noted it is undisputed that *someone* was served with EGP's summons and complaint on May 29, 2011 at 3214 East 23rd Avenue in Spokane, Washington by a licensed or registered process server.³ The trial court also noted Mr. Nolan "does indeed have crimes of dishonesty in his history, which is not contested."⁴ The trial court concluded its ruling by stating "I'm satisfied that the defendants have failed to demonstrate, by clear and convincing evidence, that service of process ... was defective, or that there is otherwise a basis pursuant to CR 60 to set aside this judgment."⁵ In reaching its ruling, the trial court refused to strike Mr. Fair's declaration but noted this declaration did not really play into the court's decision to any degree.⁶

An order denying the motion to vacate was entered on November 27, 2017, and the Frears filed their notice of appeal concerning this ruling on December 1, 2017. CP 113 – CP 114.

EGP filed its motion for award of attorneys' fees and costs on December 5, 2017. CP 119. EGP argued it was entitled to an award of its reasonable attorneys' fees and costs incurred in successfully defending

² Verbatim Report of Proceedings ("VRP") of November 6, 2017 hearing. A copy of this VRP is attached as **Appendix A**.

³ VRP of 11/6/17 hearing at 4, lines 1-7.

⁴ VRP of 11/6/17 hearing at 11, lines 10-11.

⁵ VRP of 11/6/17 hearing at 11, lines 15-19.

⁶ VRP of 11/6/17 hearing at 13, lines 5-6.

against the Frears' motion to vacate the Judgment pursuant to the written Cardmember Agreement that governs the revolving charge account that led to the Judgment. CP 119 – CP 121. Said Cardmember Agreement calls “for the payment of [EGP’s] attorneys’ fees and costs in the event of default.” CP 120. The first paragraph of the Cardmember Agreement, which is entitled ACCEPTANCE OF THIS AGREEMENT, states “You will be bound by this agreement if you or anyone else authorized by you use your account for any purpose, even if you don’t sign your card.” CP 120.

The Frears opposed EGP’s motion for attorneys’ fees and costs primarily on the grounds that EGP was, in their view, barred from recovering its attorneys’ fees and costs under the Washington Collection Agency Act, RCW 19.16 (the “WCAA”) because EGP was, allegedly, an unlicensed collection agency when it filed suit against the Frears. CP 220 – CP 222. This was the first time the Frears ever put forth the idea that EGP violated the WCAA. *See id.* EGP replied and explained why the Frears’ WCAA argument was neither properly before the trial court nor viable on the merits and why EGP should in fact recover its fees and costs from the Frears under the Cardmember Agreement. CP 233 - CP 236.

On January 19, 2018 the trial court held a hearing on EGP’s motion for attorneys’ fees and costs and granted this motion in accordance

with the Cardmember Agreement and applicable case law such as this Court's ruling in *The Collection Group, LLC v. Cook*, 186 Wn. App. 1048, 2015 WL 1609163 (Div. III, April 9, 2015) (unpublished opinion).⁷ In doing so, the trial court noted the Frears' argument concerning EGP's alleged violation of the WCAA "isn't properly before the Court."⁸ Thereafter, the Frears timely filed their notice of appeal as to the trial court's ruling on EGP's motion for attorneys' fees and costs.

III. ARGUMENT

A. **The Trial Court Did Not Err By Denying The Frears' Motion To Vacate Because The Frears Failed To Prove By Clear And Convincing Evidence That Service Was Defective.**

An appeal from the denial of a motion for relief from judgment is not a substitute for an appeal, and is limited to the propriety of the denial, not the impropriety of the underlying order. *In re Dep. of J.R.M.*, 160 Wn. App. 929, 939 n.4, 249 P.3d 193 (2011) (citing *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)). A trial court's decision to grant or deny a motion to vacate a default judgment is generally reviewed for abuse of discretion. *E.g., Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). Abuse of discretion means that the trial court

⁷ VRP of January 19, 2018 hearing at 37 - 38. The portion of the VRP of the 1/19/18 hearing that contains the trial court's oral ruling is attached as **Appendix B.**

⁸ VRP of 1/19/18 hearing at 34-35.

exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990). However, a court has a nondiscretionary duty to vacate a void judgment. *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994).

This Court has repeatedly recognized that affidavits of service are entitled to a presumption of correctness in cases where a party seeks to vacate an existing judgment. *E.g., Farmer v. Davis*, 161 Wn. App. 420, 250 P.3d 138 (2011), *review denied at* 172 Wn.2d 1019, 262 P.3d 64 (2011). Thus, when a judgment is entered based on an affidavit of service, it should only be set aside upon clear and convincing evidence that the return of service was incorrect. *E.g., id.*; *see also Cook*, 186 Wn. App. 1048, 2015 WL 1609163 (unpublished opinion).⁹

This rule is rooted in sound public policy. As seen from *Farmer*, “Washington cases have long held that considerations of the regularity and stability of judgments entered by the court require that, ‘after a judgment has been rendered upon proof made by the sheriff’s return, such judgment should only be set aside upon convincing evidence of the incorrectness of the return.’” *Id.* at 428 (quoting *Allen v. Starr*, 104 Wash. 246, 247, 176 P.

⁹ Under General Rule 14.1(a), unpublished opinions of the Court of Appeals filed on or after March 1, 2013 may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

2 (1918); *see also* *McHugh v. Conner*, 68 Wash. 229, 231, 176 P. 2 (1918) (“To avoid the judgment, the burden devolved upon appellants to show that no valid service had been made”); *Vukich v. Anderson*, 97 Wn. App. 684, 687, 985 P.2d 952 (1999) (on motion to set aside order of default and judgment, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular)).

As was further explained in *Farmer*:

Applying a presumption and higher evidentiary burden in cases where a party seeks to vacate an existing judgment accords with the development of the common law of judgments. It was a rule in common law courts that a judgment appearing to be valid on its face could not be shown to be invalid by proof contradicting the record of the action in which the judgment was rendered. Restatement (Second) of Judgments § 77, cmt. a (1982). The purpose of the common law rule was to “constitute the judgments to which it applied incontestable muniments of the rights they purported to determine.” *Id.* The modern rule is that a judgment may be impeached by evidence that contradicts the record in the action. *Id.* However, to protect judgments from contrived attack at a time when the attack may be hard to contradict if the memory of the plaintiff’s witness to the service has faded, the party challenging a judgment must produce clear and convincing evidence. *Id.* at § 77(2) & cmt. b.

161 Wn. App. at 429.

This rule is in place to prevent people like the Frears from vacating a judgment that was properly entered some seven (7) years ago. There is no doubt that the Frears have failed to show by clear and convincing evidence that EGP’s service upon Mr. Frear on May 29, 2011 was invalid.

This is because there is evidence in the record that reflects Mr. Frear himself was properly served with EGP's summons and complaint at his house of usual abode, the address in question was a good address for the Frears at the time, it appears that Mr. Frear lied to process server Stanley Rhodes by falsely identifying himself as Dave Nolan, and Mr. Frear failed to testify or put forth evidence that shows he does not match the age or physical description of the person described in the declaration of service that is identified therein as Dave Nolan.

Moreover, the process server who effectuated service in this case has testified Mr. Frear fits the description of the person described in the original declaration of service, and the process server has further testified he believes he actually served Mr. Frear with EGP's pleadings as opposed to Mr. Nolan. Meanwhile, for his part, Mr. Frear has failed to show he is not or was not the 5'9" 150 pound white male with brown hair who was about 30 years old on May 29, 2011 that is described in the declaration of service. Mr. Frear's date of birth is September 9, 1977, which means he was thirty-three (33) years old at the time of service, which is not far from being thirty (30) years of age. Further, Mr. Frear tellingly did not provide a copy of his driver's license in support of the motion to vacate (unlike his friend Mr. Noland), so Mr. Frear has not shown he is not in fact a white male who is 5'9" with brown hair.

As for Laurie Frear's testimony, EGP informed the trial court that Mrs. Frear has not denied that Mr. Frear himself was served with the summons and complaint in this case, nor has she testified that no one was served with these pleadings at her home address or that she does not know who was served with these pleadings at her home address. CP 24 – CP 25. The fact is Mrs. Frear's testimony does little if anything for the Frears' position.

Regarding Mr. Nolan's testimony, the trial court was well aware the record reflects Mr. Nolan has thrice been convicted of theft, which is a crime that "involved dishonesty" within the meaning of Evidence Rule 609 that might therefore be used to attack Mr. Nolan's credibility as a witness. EGP argued below that it would therefore be improper for the trial court to take Mr. Nolan's testimony entirely at face value. While the trial court made no specific ruling on this issue, EGP still maintains Mr. Nolan's testimony cannot be taken entirely at face value in light of his criminal record that arises from three (3) different crimes that involved dishonesty.

All things considered, the trial court rightly held the Frears failed to prove that service upon Mr. Frear was defective by clear and convincing evidence, and the trial court's ruling is supported by controlling case law that dates back well over a century. To illustrate, the

Washington Supreme Court noted in 1916 that a trial court does not abuse its discretion when it refuses to hold an evidentiary hearing and vacate a default judgment when there has been a substantial lapse of time between the entry of the judgment and the filing of the motion to vacate and there are conflicting affidavits. *Hazeltine v. Rockey*, 90 Wn. 248, 155 P. 1056 (1916). *Hazeltine* presented the situation where the judgment debtor moved to vacate a default judgment on the grounds the debtor allegedly had no notice of the judgment until after the judgment was entered. The trial court in *Hazeltine* refused to vacate the judgment, and the Washington Supreme Court affirmed this ruling. *Id.* In doing so, the state supreme court cited as precedent four (4) of its rulings in similar cases. *Id.* This line of cases dates back to 1893. *See id.* (citing *Livesley v. O'Brien*, 6 Wash. 553, 34 P. 134 (1893)).

Despite its mature vintage, *Hazeltine* remains good law, and EGP urges this Court to follow *Hazeltine's* reasoning by affirming the trial court's ruling in this case.

In sum, the Frears failed to even come *close* to proving, by *clear and convincing evidence*, that service was no good here. As such, the trial court's order denying the Frears' motion to vacate should not be disburbed on appeal.

B. The Trial Court's Ruling Is Consistent With The Case Law.

Contrary to the Frears' assertions, the trial court's ruling is in fact consistent with applicable Washington case law. As seen from the following, this case is readily distinguishable from each and every one of the cases from the Court of Appeals that the Frears rely upon in Section D of their Appellants' Brief.

Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces, 36 Wn. App. 480, 674 P.2d 1271 (1984) is not at all like this case. In that case, the plaintiff initially claimed it obtained residence service on the parents solely by serving their son at his own residence in Federal Way. *Id.* at 484, 674 P.2d at 1274. "The plaintiff conceded later, however, that at all times material herein the parents did *not* reside with their son in Federal Way but resided in Kent." *Id.* (Emphasis in original). This case is notably different from *Mid-City Materials*, as EGP does not concede (and the Frears do not assert) that the Frears' house of usual abode was different from the address where the declaration of service reflects service was made upon one "Dave Nolan, roommate" on May 29, 2011. CP 79.

Lepeska v. Farley, 67 Wn. App. 548, 833 P.2d 437 (1992) is similarly inapplicable. The plaintiff in that case tried to serve the defendant at his parents' address when it was undisputed that the

defendant maintained his own home in Burien. *Id.* at 551, 833 P.2d at 438. But unlike EGP in this case, the plaintiff in *Lepeska* “doesn’t take issue with the facts or attempt to argue that service was at the house of the defendant’s usual abode.” *Id.* at 552, 833 P.2d at 439. The plaintiff in *Lepeska* actually *conceded* that it did not serve Mr. Lepeska with process at his house of usual abode. *See id.* (Emphasis added). The Court of Appeals in *Lepeska* specifically noted that the plaintiff maintained that literal compliance with the statute was not required so long as the means employed were reasonably calculated to provide notice. *Id.* In contrast, the trial court here rightly noted EGP obtained good service on Mr. Frear, and unlike the plaintiff in *Lepeska*, EGP has not conceded it did not serve the Defendant herein with process at his house of usual abode.

As for *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 411, 236 P.3d 986 (2010), the Court of Appeals was right to vacate the default judgment in that case due to defective service because the only real evidence the plaintiff provided to suggest it served the defendant at the defendant’s house of usual abode on November 23, 2008 was documentation from the Department of Licensing that showed the Seattle address at issue was a good address for the defendant as of January 2006. The only other evidence of residence put forth by the plaintiff was King County records showing that the plaintiff had a previous ownership in the

Seattle residence that she quitclaimed in 2006, and that the police report of the car accident on September 20, 2005 (which was more than three (3) years prior to the alleged service) that gave rise to the suit listed the defendant's address as the Seattle address at issue. *Id.* Understandably, the plaintiff's lack of evidence tying the defendant to the Seattle address as of November 23, 2008, coupled with the deposition testimony from the defendant's brother to the effect that the defendant moved out of the Seattle home around 2003 to 2004, constituted ample evidence to show that service on the defendant at the Seattle address was no good because the defendant did not live there at the time of service. *Id.* In contrast, in this case, it is undisputed that the Frears were living at the address where process server Stanley Rhodes testified he left EGP's summons and complaint with a person of suitable age and discretion then resident therein on May 29, 2011.

Contrary to the Frears' assertions, this case is in fact similar to *Cook*, 186 Wn. App. 1048, 2015 WL 1609163 (unpublished decision). Like the process server in *Cook*, the process server in this case supplemented his original declaration of service years later by testifying he believes he did in fact effectuate good service on the defendant at his house of usual abode.

As for *Vukich v. Anderson*, 97 Wn. App. 684, 985 P.2d 952 (1999),

Gross v. Evert-Rosenberg, 85 Wn. App. 539, 933 P.2d 439 (1997), *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938), and *Wilbert v. Day*, 83 Wash. 390, 145 P. 446 (1995), these cases provide no support whatsoever for the Frears' position for the reasons set forth below.

Vukich v. Anderson first noted the term "usual abode" in the substituted service statute is to be liberally construed to effectuate service and uphold jurisdiction of the court. 97 Wn. App. at 686, 985 P.2d 952. *Vukich* also recognized the well-established rule that usual place of abode means "such center of one's domestic activity that service left with a family member is reasonably calculated to come to one's attention within the statutory period for defendant to appear." *Id.* The *Vukich* court also noted "under certain circumstances a defendant can maintain more than one house of usual abode." *Id.* In the end, in vacating the default judgment due to defective service, the *Vukich* court concluded service at the subject Washington address was no good where the defendant had leased out this residence and was living in a home he had bought in California (though his mail was forwarded to California) and his Washington car registration and driver's license listed the Washington address as his address. *Id.* Here, the Frears were in fact living at the subject address at the time of service, and there is no evidence in the

record that reflects their mail went elsewhere at the time of service or at any other point in time. In fact, the evidence shows the subject address was in fact a good mailing address for the Frears, as Mrs. Frear signed for garnishment pleadings at that address. Moreover, unlike the defendant in *Vukich*, Mr. Frear never produced a copy of his car registration or his driver's license, and the absence of these items in the record provide even more proof that Mr. Frear was in fact living at the address in question at the time of service and that Mr. Frear fits the physical description of "Dave Nolan, roommate" as described in the declaration of service. See *Cook*, 186 Wn. App. 1048 at * 8 ("When a party fails to produce relevant evidence within its control, without satisfactory explanation, the inference is that such evidence would be unfavorable to the nonproducing party.") (internal citations omitted). Thus, *Vukich* does not support the Frears' position.

Gross v. Evert-Rosenberg, 85 Wn. App. 539, 933 P.2d 439 (1997) is similarly inapplicable, as the plaintiff in that case tried to effectuate substitute service on the defendant by serving her at a house she leased to her daughter and son-in-law and did not live at. The Court of Appeals affirmed the trial court's grant of the defendant's motion to dismiss for improper service since the subject address was not a house of usual abode for the defendant; for not only did the defendant not reside there, but she

and her husband had moved to a new address in the same jurisdiction, notified creditors and the post office of such, and obtained a new driver's license that listed this new address. *Id.* Again, it is undisputed here that the Frears were living in the subject property at the time of service and that this property was their house of usual abode.

As for *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938), although the Washington Supreme Court found the original affidavit of service defective in that case, "the more pertinent holding of *Gooley* for purposes of this case is that it is proper to permit the filing of an amended return of service 'as the actual facts control; and if jurisdiction was actually acquired over the persons of the defendants, that fact should govern.'" *Cook*, 2015 WL 1609163 at * 3. Process server Stanley Rhodes's supplemental declaration makes clear the fact that jurisdiction was actually acquired over the Frears in this case because service upon Mr. Frear was in fact good back on May 29, 2011.

The Frears' reliance on *Wilbert v. Day*, 83 Wash. 390, 145 P. 446 (1915) is similarly misguided, as after service was made in that case, the defendant testified he lived in Idaho at the time of the alleged service in Spokane, moved to quash the service as a result, and the defendant's "affidavit was not denied." 83 Wash 390, 145 P. at 447. It was therefore undisputed that the defendant in *Wilbert* did not reside at the subject

Spokane address at the time of service. *Id.* In contrast, it is undisputed here that the Frears did in fact live at the subject address at the time of service, and unlike the plaintiff in *Wilbert*, EGP provided evidence in opposition to the evidence put forth by the opposing party.

The Frears next cite *Scanlan v. Townsend*, 181 Wn.2d 838, 840, 336 P.3d 1155 (2014), *State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60, 65-66, 7 P.3d 818 (2011), and *Sheldon v. Fettig*, 129 Wn.2d 601, 604, 919 P.2d 1209 (1996) for the proposition that “cases in which courts have found substitute service proper have invariably relied on special circumstances not present here.”¹⁰ In reality, these cases and others demonstrate substitute service is regularly deemed proper and upheld in run-of-the-mill cases and that the substitute service statute is to be liberally construed to uphold the jurisdiction of the court. For example, the state supreme court held in *Scanlan v. Townsend*, 181 Wn.2d 838, 336 P.3d 1155 (2014) that substitute service was good where a process server delivered process to the defendant’s father at his home, the defendant did not live there, and the father later handed the pleadings directly to the defendant. Like the defendant in *Townsend*, there is evidence that reflects Mr. Frear was personally delivered a copy of the summons and complaint, as seen from the process server’s sworn testimony. The fact that Mr. Frear

¹⁰ Brief of Appellants at 30.

received these pleadings directly from a process server as opposed to a relative of his is of no legal consequence whatsoever.

State ex rel. Coughlin v. Jenkins, 102 Wn. App. 60, 7 P.3d 818 (2000) was not a “special” case either. In noting the defendant in that case failed to prove the place of service was not his usual abode by clear and convincing evidence, the court found the state’s address for the defendant was good where the state obtained this address from two searches through two national credit bureaus, Trans-Union Corporation and Equifax & Affiliates, all handwritten correspondence from the defendant after service listed this same address as his return address, and no mail sent to that address was ever returned. *Jenkins*, 102 Wn. App. at 65-66, 7 P.3d at 822. Like the Frears in this case, the defendant in *Jenkins* failed to carry his evidentiary burden by proving, by the requisite standard of clear and convincing evidence, that he was not served with process at his house of usual abode.

As for the Frears’ reliance on *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996) (*en banc*), this case actually supports EGP’s position. In *Sheldon*, the Washington Supreme Court held the term “usual place of abode” used in the statute allowing substitute service of process is to be liberally construed to effectuate service and uphold jurisdiction. *Id.* The *Sheldon* court further held that a person can have more than one house

of usual abode, and that the defendant's parents' home was a usual place of abode for her even though she was working in Chicago and had an apartment there. *Id.* The state supreme court further noted the term "usual place of abode" refers to the place at which the defendant is most likely to receive notice of the pendency of suit and concluded substitute service made on the defendant was proper. *Id.* Unlike the defendant in *Sheldon*, the record indicates the Frears had only one usual place of abode at the time of service, which was their residence; and this is the place where the process server has testified Mr. Frear was served with EGP's summons and complaint.

Finally, regarding *Salts v. Estes*, 133 Wn.2d 160, 943 P.2d 275 (1997) (*en banc*), the state supreme court in that case affirmed the lower courts by holding service of process upon a person who was temporarily in the defendant's home to feed his dogs and take in his mail was insufficient under the substitute service of process statute. In contrast, whomever was served with EGP's summons and complaint at Mr. Frear's residence and identified as "Dave Nolan, roommate" either told the process server at the time of service or otherwise convinced him that he lived at the property. The record here does not state (or even suggest) that the man who was served with EGP's summons and complaint outside of the Frear home on May 29, 2011 was only there to feed the pets or take in the mail.

C. **EGP Requests An Award Of Attorney's Fees And Costs If It Prevails On Appeal.**

Attorney fees on appeal can be awarded if law, contract, or equity permits an award of fees. RAP 18.1(a). The written terms and conditions that govern Mr. Frear's revolving charge account with EGP (the "Cardmember Agreement") call "for the payment of [EGP's] attorneys' fees and costs in the event of default." In addition, the first paragraph of the Cardmember Agreement, which is entitled ACCEPTANCE OF THIS AGREEMENT, states "You will be bound by this agreement if you or anyone else authorized by you use your account for any purpose, even if you don't sign your card." If it prevails in this appeal, EGP seeks an award of its costs and attorneys' fees incurred in connection with this appeal pursuant to EGP's written contract with the Frears, namely the Cardmember Agreement.

In this case, an award of EGP's costs and attorneys' fees incurred on appeal in successfully defending against the Frears' motion to vacate EGP's Judgment is warranted under the Cardmember Agreement even though judgment was entered on said agreement some time ago, because provisions in a contract or a note providing for attorney fees do apply until the judgment is final. *See, e.g., Woodcraft Constr., Inc. v. Hamilton*, 56 Wn. App. 885, 786 P.2d 307 (1990) (citing *Puget Sound Mut. Sav. Bank v.*

Lillions, 50 Wn.2d 799, 314 P.2d 935 (1957)). If it prevails herein, EGP's Judgment will be final because this Court will have affirmed the trial court's ruling denying the Frears' motion to vacate.

Furthermore, in a case similar to this one that came before this very Court several years ago, the Court awarded attorney's fees and costs to the creditor who prevailed on appeal by obtaining a ruling that affirmed the trial court's refusal to vacate a default judgment pursuant to a contractual provision in a cardmember agreement. *Cook*, 186 Wn. App. 1048, 2015 WL 1609163 (unpublished opinion). Thus, *Cook* reflects this Court has ruled post-judgment attorney's fees may be awarded pursuant to a cardmember agreement long after the original judgment was entered on the agreement when the original judgment withstands a subsequent attack.

The Frears argue EGP cannot recover its attorneys' fees or costs even if it prevails herein in light of RCW 19.16.450 because EGP was, allegedly, an unlicensed collection agency when it brought suit against the Frears some years ago.¹¹ As the Frears acknowledge, EGP argued, and the trial court agreed, that the WCAA penalty sought by the Frears "is not properly before the Court" because the Frears did not argue EGP violated the WCAA until they filed their response to EGP's motion for attorneys'

¹¹ Brief of Appellants at 32.

fees and costs.¹² The Frears “never asserted a WCAA claim in this case as a counterclaim, nor have [the Frears] asserted any such claim against [EGP] in a separate lawsuit.”¹³ EGP cannot rightly now be penalized under the WCAA without a court of competent jurisdiction having first entered a final judgment to the effect that EGP did in fact violate the WCAA insofar as the Frears are concerned. To hold otherwise would violate EGP’s rights to the due process of law under the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the Washington State Constitution.

Nevertheless, the Frears contend they can raise the issue of a WCAA violation “even in the context of a supplemental fee petition” under the Washington Supreme Court’s ruling in *Streng v. Clarke*, 89 Wn.2d 23, 56 P.2d 60 (1977) (*en banc*). But “[t]he sole issue in [*Streng*] is whether justice district courts have jurisdiction to entertain and try damage claims arising under the Consumer Protection Act, RCW 19.86.” *Id.* at 24, 56 P.2d at 61. The Frears assert “there is no indication that the [WCAA] violation [in *Streng*] was raised by way of a counterclaim.”¹⁴ This assertion is incorrect. The debtor in *Streng* “counterclaimed for treble damages under RCW 19.86.090 of the Consumer Protection Act

¹² Brief of Appellants at 34-35; CP 219-220.

¹³ Brief of Appellants at 35.

¹⁴ Brief of Appellants at 36.

[the “CPA”]. The debtor alleged that respondent engaged in abusive collection practices proscribed by RCW 19.16.440[.]” *Id.* at 25, 56 P.2d at 61. Thus, *Streng* does not stand for the proposition that a WCAA violation “can be raised at any time, even in the context of a supplemental fee petition.” After all, the consumer in *Streng* asserted counterclaims under the WCAA and/or CPA for “abusive collection practices,” and the Washington Supreme Court held the justice court erred and that the consumer’s counterclaims could be adjudicated therein because the justice court has jurisdiction over claims brought under the CPA. *Streng*, 89 Wn.2d at 25-26, 569 P.2d at 62. The *Streng* court did not hold or even state or suggest in dicta that WCAA or CPA claims “can be raised at any time, even in the context of a supplemental fee petition.”

In addition, even if the WCAA issue could somehow be deemed to be properly before the Court, EGP has already demonstrated to the trial court why EGP cannot rightly be deemed to be a “collection agency” under the WCAA as it existed when EGP filed suit in this case.”¹⁵ CP 234. That is because the applicable, pre-amendment statute in effect when EGP filed suit against the Frears reflects a debt buyer like EGP could only be deemed to be a “collection agency” in need of a collection agency

¹⁵ Amendments to the WCAA became effective as of October 1, 2013. CP 336. Under the amended, current form of the WCAA, all debt buyers operating in Washington must have a collection agency license. EGP has such a license, as does its managing agent, Fair Resolutions, Inc.

license if it directly or indirectly engaged in soliciting claims for collection, and EGP never solicited *anything*. See CP 234; (former) RCW 19.16.100(2)(a); *Gray v. Suttell & Associates*, 181 Wn.2d 329, 344, 334 P.3d 14, 21 (2014) (“We hold [Midland Funding] ... cannot [file lawsuits] if it is found to be a ‘collection agency’ under former RCW 19.16.100(2) ... Midland Funding acts as a collection agency if it solicits claims for collection.”)

EGP provided to the trial court sworn declarations and a ruling from a case entitled *EGP Investments, LLC v. Belisle*, Spokane District Court Cause Number 12136397, that shows EGP never directly or indirectly solicited claims for collection. EGP also provided evidence to the trial court that shows the regulatory agency at the state that is tasked with overseeing collection agencies *told* EGP it was not required to have a collection agency license, and that the state preferred debt buyers like EGP not apply for such a license until June 6, 2013 (CP 314; CP 336), some two (2) years after EGP filed suit against the Frears. As such, in no way whatsoever do the Frears have any legitimate basis to assert EGP violated the WCAA insofar as they are concerned.

The Frears further assert that in the event they prevail on appeal, they are entitled to recover their attorney’s fees and costs from EGP under RCW 4.84.290, the Cardmember Agreement and RCW 4.84.330, and

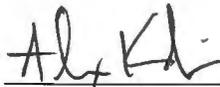
RCW 6.27.230. EGP acknowledges the Cardmember Agreement could serve as a basis for the recovery of the Frears' attorney's fees and costs if they prevail on appeal. However, RCW 4.84.290 provides the Frears with no avenue of relief because this statute concerns RCW 4.84.250, which applies only to attorneys' fees as costs in the context of offers of settlement in damage actions of \$10,000 or less. Because more than \$10,000 is at issue in this case, and because the Frears never made an offer of settlement to EGP, these statutes are inapplicable herein. *See, e.g., Smukalla v. Barth*, 73 Wn. App. 240, 868 P.2d 888 (1994) (defendant was not "prevailing party" so as to be entitled to attorney fees under statute governing attorney fees as costs in damage actions of \$10,000 or less, as plaintiff did not plead damages of \$10,000 or less and defendant did not make offer of settlement as defined by statute). As for RCW 6.27.230, that statute is also inapplicable to this case because no one has controverted an answer to a writ of garnishment herein, nor is any such answer to a writ of garnishment at issue in this appeal. As such, neither party on appeal could possibly recover its costs or attorney's fees under this statute. *See, e.g., Bartel v. Zuckriegel*, 112 Wn. App. 55, 66, 47 P.3d 581 (2002) (citing RCW 6.27.230 and noting attorney fees and costs are available to the prevailing party on appeal of a garnishment controversion proceeding).

IV. CONCLUSION

The trial court did not abuse its discretion by denying the Frears' motion to vacate EGP's Judgment, and the Frears did not even come close to proving by clear and convincing evidence that service upon Mr. Frear was defective. As such, EGP asks this Court to affirm the trial court's ruling, dismiss this appeal, and award EGP its reasonable attorneys' fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED this 29th day of June, 2018.

EISENHOWER CARLSON PLLC

By: 
Alexander S. Kleinberg, WSBA # 34449
Attorneys for Plaintiff/Respondent EGP
Investments, LLC

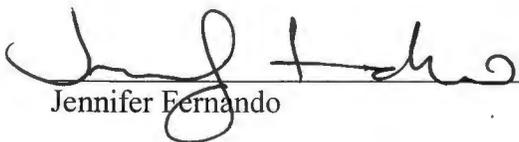
DECLARATION OF SERVICE

I, Jennifer Fernando, am a legal assistant with the firm of Eisenhower Carlson PLLC, and am competent to be a witness herein. On June 29, 2018, at Tacoma, Washington, I caused a true and correct copy of EGP Investments, LLC's Brief of Respondent to be served upon the following in the manner indicated below:

<u>Counsel for Appellants</u> Kirk D. Miller Kirk D. Miller, P.S. 421 W. Riverside Ave, Suite 660 Spokane, WA 99201 (509) 413-1494	<input type="checkbox"/>	U.S. Mail, postage prepaid
	<input type="checkbox"/>	Hand Delivered via Messenger Service
	<input checked="" type="checkbox"/>	Overnight Courier
	<input type="checkbox"/>	Electronically via email
	<input type="checkbox"/>	Facsimile
<u>Counsel for Respondent</u> Andrea L. Asan Paukert & Troppmann, PLLC 522 West Riverside, Suite 560 Spokane, WA 99201 (509) 232-7760	<input type="checkbox"/>	U.S. Mail, postage prepaid
	<input type="checkbox"/>	Hand Delivered via Messenger Service
	<input type="checkbox"/>	Overnight Courier
	<input checked="" type="checkbox"/>	Electronically via email
	<input type="checkbox"/>	Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of June, 2018, at Tacoma, Washington.


 Jennifer Fernando

APPENDIX A

1 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**

2 **IN AND FOR THE COUNTY OF SPOKANE**

3
4 EGP INVESTMENTS, LLC, a)
Washington limited liability)
5 company,) COA No. 35734-1
)
6 Plaintiff,) Sup. Ct. Cause
) No. 11-2-04025-3
7 v.)
)
8 MARVIN R. FREAR JR,)
individually, and the marital)
9 community comprised of MARVIN)
R. FREAR JR and JANE DOE)
10 FREAR, husband and wife,)
)
11 Defendant.)

12 **HONORABLE MICHAEL P. PRICE**
13 VERBATIM REPORT OF PROCEEDINGS
14 (November 6, 2017 - Judge's Ruling)

15 APPEARANCES:

16 FOR THE PLAINTIFF: ANDREA L. ASAN
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21 Spokane, Washington 99201

22
23 Crystal L. Hicks, CCR No. 2955
 Official Court Reporter
24 1116 W. Broadway, Department No. 5
 Spokane, Washington 99260
25 (509) 477-4412

I N D E X - November 6, 2017

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Judge's Ruling

1 As Counsel mentioned, there doesn't seem to be a
2 dispute that someone was served on May 29, 2011, at an address
3 of 3214 East 23rd Avenue in Spokane, Washington. I don't
4 recall counsel suggesting there wasn't service of process on a
5 human being at that property.

6 First of all, I have a licensed and/or registered
7 process server, Mr. Rhodes, and it should be noted that
8 process servers have to, when they submit a declaration of
9 service, sometimes they do affidavits of service, but a
10 declaration of service will say: I swear under penalty of
11 perjury under the laws of the State of Washington that the
12 foregoing is true and correct.

13 So, when a process server signs his or her name to a
14 declaration of service, they are subjecting themselves to
15 criminal penalties should they lie or fail to tell the truth.
16 Here, I have a process server who has subjected himself to
17 those penalties who swears that he served a 150-pound white
18 male, five-foot-nine inches, about 30 years old, with brown
19 hair, who identified himself as Mr. Frear's roommate, Dave
20 Nolan.

21 And the attorneys didn't really get into CR 60, at
22 least in oral argument, and counsel usually reserve oral
23 argument for what they believe is the most succinct point to
24 get the Court's attention. But, for purposes of the law I
25 have to focus on CR 60. CR 60 is the tool that a lawyer or a

Judge's Ruling

1 party will employ when they're seeking to vacate a judgment.
2 And I'm not reading the rule, but paraphrasing right now. CR
3 60 does enable a party to seek vacation of a judgment for any
4 number of reasons. It could be because of newly discovered
5 evidence. It could be because of clerical error or mistake or
6 inadvertence of some sort. It could be because of erroneous
7 proceedings against a minor. I've only seen that once in my
8 15 years down here, but that does happen. It could be because
9 of unavoidable casualty or misfortune.

10 For example, someone is overseas and is injured in a
11 catastrophic act of nature, earthquake, or something like
12 that. They don't know about this court action because of some
13 extraordinary life event. It could be because of fraud, which
14 is almost nonexistent, frankly. I know it does happen, but
15 it's very rare.

16 But, usually, the reason that is cited for the Court
17 to vacate a judgment pursuant to CR 60 is CR 60(b)11, which
18 is -- and, frankly, I call it the catch-all provision of CR
19 60. Any other reason justifying relief from operation of the
20 judgment. That is almost always what Counsel or a party will
21 fall back on, or at least they'll cite that as a secondary
22 option for their motion.

23 Now, I have the benefit of having good lawyers here,
24 and, so, in that regard, counsel are aware that just about
25 every appellate case that -- at least that I can recall

Judge's Ruling

1 seeing -- that deals with the question of CR 60 and deals with
2 the issue of a default judgment, the appellate courts seem to
3 always use this particular nomenclature. The quote is that:
4 "The Court abhors a default." You see it constantly in
5 appellate rulings in Washington State.

6 The Court abhors a default, which is kind of our
7 fancy way of saying we don't like defaults for all sorts of
8 reasons, because it goes against everything that we hold dear
9 to a certain extent in the judicial system, which is due
10 process and opportunity for someone to be heard and to
11 respond. And the very nature of our system adversarial, which
12 enables someone to bring their position to the Court and a
13 party to respond in opposition. That's how this all works.

14 When someone is defaulted, it's clear that only one
15 party is heard, which is not the preferred way we would like
16 to see these cases resolved. We would like everybody to be at
17 counsel table, not just one side.

18 Central to CR 60 is the requirement these motions be
19 brought within one year after judgment was taken. That's a
20 very important requirement of the rule because, if you think
21 about it, without some responsibility for an individual to be
22 reasonably diligent here, frankly, if there wasn't a timeframe
23 contemplated in the rule, a party could otherwise just be that
24 proverbial snake in the grass. You know, you could wait, for
25 any number of reasons, until -- the suggestion here has been

Judge's Ruling

1 to wait around, and how convenient the statute of limitations
2 has run.

3 So, circling back to the burden, which is on the
4 party seeking vacation of the judgment. That burden is clear
5 and convincing. Clear and convincing isn't -- it's not
6 reasonable doubt, which is the highest standard we have. It's
7 not preponderance. It's clear and convincing. And it allows
8 me to really focus in on some of the detail that I think the
9 parties and counsel would expect the Court to focus on.

10 Central to the Court's analysis would be: Why did
11 the Frears wait? Why did they wait almost seven years before
12 they pursued this motion, before they pursued an action to
13 vacate this default? It doesn't seem to be disputed that, in
14 some fashion, the Frears have been aware that a judgment, or
15 perhaps a collection action of some sort, was ongoing, or a
16 judgment had been taken against them. And yet, they did
17 nothing, at least in terms of seeking relief as to the
18 default. So, this could be, in many circumstances, a fatality
19 to your CR 60 motion.

20 This isn't an equitable proceeding. It's a
21 proceeding at law, but the Court can consider equity, and
22 that's just inherent in CR 60, which is a basis I hear
23 consistently in opposition to a motion to vacate. Counsel
24 often cite the equitable principle of laches in matters such
25 as this.

Judge's Ruling

1 Laches, if you've ever looked it up, literally
2 translates to "equity aids the vigilant." All that really
3 means is, if you get off your tail and address this, you're
4 going to be in a lot better shape than if you just sit on it.
5 Equity aids the vigilant. Pursue relief from the Court if you
6 know there's a problem. And to have it out there, if you
7 will, for all these years after a judgment entered that you
8 knew about, that question just isn't answered here at all.

9 Again, it was to some extent touched on in the
10 pleadings, which is that, in 15 minutes, you can go get online
11 and pull a copy of your credit report. Literally, in 15
12 minutes, you can do that. Everyone is certainly aware that
13 this is a major issue right now because of some of the recent
14 problems with Equifax. Regardless, you can easily get an
15 up-to-date credit report on yourself, and that credit report
16 will tell you in minutes whether someone has entered a
17 judgment against you.

18 If there's a judgment against you for money owed,
19 that can have extraordinary ramifications. It can prevent you
20 from purchasing a home, from selling a home, from receiving
21 money that you thought you were going to get in closing that
22 you were going to use on another home. It can prevent you
23 from getting a credit card that you might need. It can
24 prevent you from getting a loan to buy a vehicle. There
25 really are extraordinary ramifications when there's a judgment

Judge's Ruling

1 against you.

2 I don't agree with counsel's suggestion that it's no
3 big deal, that anybody can become a registered process server.
4 They just pay the fee, and that's all there is to it, or, as I
5 heard, somebody could just throw the pleadings over the fence.
6 There are certainly examples where service of process was far
7 from perfect.

8 But, again, I come back to my earlier statement that
9 a process server is swearing under penalty of perjury under
10 the laws of the State of Washington that what they're saying
11 is true and correct, and it just strikes the Court as
12 completely nonsensical to suggest that a process server, who,
13 in fact, makes their living conducting service of process,
14 would act in a cavalier fashion about this. It's just
15 nonsensical to suggest that took place here.

16 Process servers are completely reliant on the same
17 thing lawyers are. Your word is your bond, and if people
18 don't trust you and if you have a reputation for not being the
19 most thorough process server or thorough and complete
20 attorney, you're not going to get a lot of work. It's only
21 going to take a short amount of time before that catches up to
22 you, and you'll be looking for a new career.

23 An appellate decision from quite a few years ago
24 reminded me of a case that I presided over. If you're aware
25 there's a judgment that's been taken against you, if you're

Judge's Ruling

1 aware that there's an issue out there that conceivably could
2 harm you, you have a duty to mitigate your damages. That's
3 probably something we all hear in law school in the first week
4 of contracts and then forget. But clearly, everyone has a
5 duty to mitigate their damages if they know about it.

6 For example, the pipe breaks in the basement of your
7 home because of subzero weather, and your basement starts
8 flooding, and you discover it when there's two inches of water
9 in the basement. You have a couple options. One option would
10 be, you can shut the water off and call the insurance company
11 and let them know that you've had this damage to your house.
12 The other option would be, you don't shut the water off, and
13 you decide to let the water go ahead and flood all the way to
14 the first floor. Might sound absurd, but these kind of crazy
15 things happen. You don't get to do that, obviously. You
16 don't get to say to your insurance company "my house flooded,
17 so fix everything," when you could have easily prevented much
18 of the damage.

19 Applying this principle to the instant case, once
20 you become aware that you have an issue, that there's a
21 judgment that may have been taken against you, or a collection
22 action that's being pursued, you have a duty to mitigate and
23 go forward with your action before the Court.

24 The Frears had a duty to mitigate, and, for whatever
25 reason, they did nothing for seven years. As the Court looks

1 at this case, I'm aware that the statute of limitations would
2 be expired if the Court was to vacate the judgment. You have
3 a duty, pursuant CR 60, to bring this motion within a
4 reasonable period of time. The rule contemplates one year,
5 and we're at least six years past that here.

6 I want to mention, since counsel spent a significant
7 amount of time on it, whether the credit report was or was not
8 inappropriately obtained. The point of the report was to
9 discern whether the person has crimes of dishonesty on his
10 record, and the Court can properly consider that. Here,
11 Mr. Nolan does indeed have crimes of dishonesty in his
12 history, which is not contested. I'm going to take a guess
13 and say that's why the report was obtained in this case, to
14 advise the Court regarding the veracity of his testimony.

15 Having said all of this, I'm satisfied that the
16 defendants have failed to demonstrate, by clear and convincing
17 evidence, that service of process, approximately six and a
18 half years ago, was defective, or that there is otherwise a
19 basis pursuant to CR 60 to set aside this judgment.

20 So, with that in mind, Counsel, I will be denying
21 the motion. Counsel, do you want to draft something back at
22 your offices, or do you want to try to pencil out something
23 here?

24 MR. MILLER: Your Honor, I think we can probably
25 pencil something out back at the office and maybe set a

Judge's Ruling

1 presentment date. I'd ask for a couple points of
2 clarification though, if I might?

3 THE COURT: Sure.

4 MR. MILLER: It's my understanding that the Court
5 ruled that the defendant's basis for bringing this motion was
6 under 60(b)(11); is that correct? That's your understanding?

7 THE COURT: No. What I said was that's one part of
8 the rule that parties often cite in support of their motion.

9 MR. MILLER: Okay. And is the Court making any
10 finding of fact about who was served, if anyone?

11 THE COURT: No. I'll make a finding that there was
12 service. I'm satisfied of that, and there wasn't any response
13 in opposition to that. So, I'm going to make a finding that
14 service was completed.

15 MR. MILLER: And, I mean, it belabors the point, but
16 the declaration says it was Mr. Nolan. Are you thinking
17 Mr. Nolan was served or somebody else or are you --

18 THE COURT: I don't need to go there, Counsel.

19 MR. MILLER: Okay. And then, lastly, are you ruling
20 that, pursuant to some rule, that the Court is allowed to
21 consider a credit report submitted on a nonparty?

22 THE COURT: No. Again, that's not what I said.
23 What I said was the Court can consider a person's criminal
24 history, as it pertains to their truthfulness when they
25 testify, if they have crimes of dishonesty on their criminal

Judge's Ruling

1 record. And here, Mr. Nolan, who submitted a declaration,
2 does have crimes of dishonesty on his criminal record.

3 MR. MILLER: So, the Court is not ruling on the
4 motion to strike then?

5 THE COURT: I'm not going to strike it, but,
6 frankly, it really didn't play into my decision to any degree.

7 MR. MILLER: Thank you.

8 THE COURT: Okay. And, Counsel, just, you know, a
9 courtesy heads up. We don't do presentments in here anymore
10 because we've discovered that when you do that, it ends up
11 being an additional opportunity to argue. So, what we can do
12 is Ms. Dorman will give you a date that I need to have the
13 order back. If you two don't agree on what it should say,
14 then just do your own orders.

15 MR. MILLER: Sure.

16 THE COURT: I don't know that you necessarily need
17 findings and conclusions. I'll leave that up to you.

18 MR. MILLER: We want them.

19 THE COURT: I'll have Ms. Dorman step out in a
20 minute. She'll give you a date that we can put on the
21 calendar to make sure I get the pleadings back. All right.
22 Counsel, thank you very much.

23 MS. ASAN: Thank you, your Honor.

24

25

(End of proceedings.)

C E R T I F I C A T E

I, CRYSTAL L. HICKS, do hereby certify:

That I am an Official Court Reporter for the Spokane
County Superior Court, Department No. 5, at Spokane,
Washington;

That the foregoing proceedings were taken on the
date and time and place as shown on the cover page hereto;

That the foregoing proceedings are a full, true, and
accurate transcription of the requested proceedings, duly
transcribed by me or under my direction.

I do further certify that I am not a relative of,
employee of, or counsel for any of said parties, or otherwise
interested in the event of said proceedings.

*The Court's ruling was read and approved by Judge
Michael Price, pursuant to LCR 80.

DATED this 16th day of January, 2018.

CRYSTAL L. HICKS, CCR
Official Court Reporter
Spokane, Washington

APPENDIX B

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EGP INVESTMENTS, LLC,)	
)	
Respondent,)	SPOKANE COUNTY
)	SUPERIOR COURT
vs.)	NO. 2011-02-04025-3
)	
MARVIN R. FREAR, JR., and)	COURT OF APPEALS
JANE DOE FREAR,)	NOS. 357341, 358496
)	
Appellants.)	

VERBATIM REPORT OF PROCEEDINGS
VOLUME 1, PAGES 1 - 40
JANUARY 19, 2018, MORNING SESSION

The above-entitled matter was heard before the Honorable Michael P. Price, Superior Court Judge for the State of Washington, County of Spokane.

APPEARANCES:

For the Respondent:	ANDREA ASAN Attorney at Law Paukert & Troppmann, PLLC 522 W. Riverside Ave., Ste. 560 Spokane, Washington 99201
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For the Appellants:	KIRK D. MILLER Attorney at Law Kirk D. Miller, P.S. 421 W. Riverside Ave., Ste. 660 Spokane, Washington 99201
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1 become licensed. That is simply not true. The -- number
2 one, they could still collect on the principal amount.
3 They just can't get additional attorney's fees, interest,
4 costs, anything of that nature. And if they are newly
5 collecting on claims since they've become licensed, then
6 that would be acceptable as well. What we're talking
7 about is collection that occurred prior to their
8 licensing, which would be a violation of the Collection
9 Agency Act and a subsequent violation of the additional
10 penalty under 19.16.450.

11 THE COURT: Thank you so much, Counsel.

12 MR. MILLER: Thank you.

13 THE COURT: All right. Ms. Asan and Mr. Miller, I'm
14 going to need about 10 minutes here to pencil this out,
15 so if you want to stretch your legs or get a drink of
16 water or something else.

17 So, Terri, I'll be off the record for probably 10
18 minutes or so here. I'm just going to stay here.

19 MS. ASAN: Thank you, Your Honor.

20 THE COURT: Thank you, Counsel.

21 (Discussion off the record.)

22 THE COURT: So, Counsel, if you're ready, let's go
23 back on the record, please.

24 All right. This would be the matter of EGP
25 Investments, LLC, which is a Washington limited liability

1 company, plaintiff, vs. Marvin R. Frear, Junior,
2 individually, and the marital community comprised of
3 Marvin R. Frear, Junior, and Jane Doe Frear, husband and
4 wife, as defendants. And the cause number here in
5 superior court is 11-2-04025-3. And Ms. Asan is here on
6 behalf of the plaintiff; Mr. Miller is here on behalf of
7 the defendant -- or defendants, I should say. The
8 clients aren't here, but that's not necessary for this
9 proceeding, so no issue there.

10 So I guess I'll start out by saying that, first of
11 all, Counsel, I appreciate your argument and hearing from
12 both of you today. And I probably spent far more time
13 upon this hearing than you anticipated. And I apologize
14 if I'm making you late for something else, but, frankly,
15 I was very interested in hearing what you both had to
16 say.

17 And I started out -- at least I hope I started out by
18 saying that I read all of your material in detail and
19 then took everything home last night, read it again,
20 which was a significant task, but that's my
21 responsibility and I did that. And I do have to admit I
22 was somewhat perplexed by the pleadings that I received
23 from Mr. Frear in terms of what I expected to be his
24 objections to the request for fees.

25 And Ms. Asan started out essentially in responding by

1 arguing that what Mr. Frear is doing is essentially
2 collaterally -- or attempting to collaterally attack the
3 underlying district court's ruling. I guess I should
4 have laid down that foundation, that this matter had its
5 inception in the district court where a judgment was
6 taken, and to be clear, a default judgment was taken
7 against Mr. Fear in the district court a number of years
8 ago related to a credit card account.

9 Now, this Court, as in superior court's involvement in
10 this matter has been -- this judicial officer has been
11 confined to the CR 60 motion brought by Mr. Frear.

12 And by the way, Mr. Miller, it's too bad the gentleman
13 that was here before you didn't hire your office. He
14 would have figured out how to do a show cause order. But
15 unfortunately he didn't.

16 But in terms of this Court's involvement, it's been
17 confined to the CR 60 motion that Mr. Frear brought that
18 the Court heard a number of weeks back. And that request
19 was essentially to have the judgment set aside that was
20 taken by Mr. Frear back in -- I think, Counsel -- correct
21 me if I'm wrong -- back in 2011 in the district court. I
22 denied that CR 60 motion. And so at this point that
23 would be the law of the case.

24 Now, Mr. Frear, I suppose, despite his argument that
25 he's not attempting to collaterally attack the district

1 court's ruling, in essence arguing that the contract with
2 the debtor was never admitted into evidence before the
3 district court. And I appreciate Mr. Miller's patience
4 with me as I sort of hampered him with questions,
5 because, Counsel, you're the experts in this area; this
6 is what you do day in and day out.

7 I was really very interested in what you both had to
8 say, and I was trying to pin things down. And it was
9 clear to me that one argument that the defendant was
10 making was that -- I'll use the word "Cardmember
11 Agreement" or the contract with the credit card holder
12 was never properly admitted into evidence before the
13 district court. And, again, this is a superior court,
14 and I decline to set aside the underlying district court
15 pursuant to CR 60. So that would, in fact, be a
16 collateral attack that Mr. Frear is attempting to bring
17 before the Court today.

18 And I've been doing this 15 years, at least down here.
19 I'm not aware of any law that supports the theory that a
20 Cardmember Agreement must be somehow -- I'll call it
21 "formally admitted into evidence," if you will.

22 When I think of that process, I think of a trial where
23 there's a motion to admit, the Court entertains
24 objections, and then makes a decision whether the exhibit
25 will or will not be admitted. Typically what happens --

1 I'm not a district court judge, but typically what
2 happens is material is brought before the Court. If
3 there's a hearing, it's a completely different matter, I
4 would imagine. If it's by default, then the Court would
5 expect that the underlying request would be backed up by
6 exhibits that are attached to the pleadings. And that's,
7 in fact, what happened here. The Cardmember Agreement
8 was clearly attached to the underlying pleadings that
9 were submitted to the district court for which the
10 default was taken against Mr. Frear years back. That is
11 the law, that it be before the Court and for the Court to
12 consider it. And that's what happened.

13 Now, second, I am simplifying this -- I had a
14 hundred-plus pages of pleadings to look at, but I'm
15 simplifying this in a great degree. There was a lot of
16 discussion in the pleadings about the Washington
17 Collection Agency Act. And, again, I'm simplifying this,
18 but Mr. Frear argues that essentially the WCAA prohibits
19 the plaintiffs from any collection -- or collecting any
20 funds, if you will, or proceeds beyond the underlying
21 principal and that their actions here are, sounded like,
22 multiple aspects of violation of the WCAA and that's
23 where this Court's analysis should end in terms of the
24 defendants' position.

25 And, frankly, that entire argument isn't properly

1 before the Court. I wanted to hear argument on it
2 because I wanted to hear argument. I like to give
3 counsel the opportunity to present their position. But
4 it's not properly before the Court. It was never
5 asserted as a counterclaim, that I could find, or in a
6 separate lawsuit that this Court is aware of. I'm going
7 to take a guess, but I'm going to assume that's the
8 rabbit hole that Ms. Asan was talking about. I took
9 counsel down that rabbit hole, so I take responsibility
10 for that, at least in terms of the argument today.

11 But what I expected when I got the pleadings was I
12 expected a response pursuant to the fees requested by
13 plaintiffs pursuant to a lodestar analysis, which is what
14 this Court typically would address when determining
15 whether fees are appropriate. And as counsel's probably
16 aware, a lodestar analysis would include the Court
17 looking at a number of factors: whether the attorney's
18 fees that are requested are a reasonable amount of fees
19 within the legal community that the lawyers practice in.
20 That can be based on other lawyers in the community and
21 what they charge. The Court can look at the experience
22 level of counsel who are asserting their hourly rate,
23 which, in fact, their curriculum vitas, to a certain
24 extent, and information regarding counsel is provided to
25 the Court. And also the Court would be required,

1 pursuant to lodestar, as counsel would, to look at the
2 complexity of the issues presented; is it something
3 that's fairly simplistic and straightforward or is there
4 complications or intricate legal issues that need to be
5 explored. The Court also, on lodestar, looks at whether
6 there's, for example, duplicity in any way; could
7 counsel's office have perhaps cut the expenditures back
8 by allowing paralegals to do the work or Rule 9s.

9 Those are all things that I look at in a lodestar
10 analysis to determine whether fees are appropriate or
11 not. And, frankly, the Court very carefully looks over
12 attorney-fee declarations regarding fees. I think that's
13 my obligation, not that I don't trust counsel, but it's
14 more than that. It's determining whether the fees are
15 appropriate given the complexity of the case.

16 And here, there was essentially virtually no objection
17 to the plaintiff's fees, at least under the lodestar
18 analysis, and/or suggestion that the fees were
19 unreasonable. Although to be fair to the defendants,
20 they did make a comment about a recent ethics opinion in
21 which makes clear that the amount of fees you charge your
22 client have to be one and the same as the fees that are,
23 in fact, suggested to the Court that you've charged.
24 That makes sense to me.

25 But I would suggest, in terms of Mr. Frear's position,

1 that the fees have likely been exacerbated by him as a
2 result of voluminous pleadings that he's filed that the
3 plaintiffs have had to respond to, legal arguments,
4 which, while perhaps unsupported, you still have to
5 respond to it. You can't just let it hang out there.
6 You need to reply. And every time you do that, it costs
7 money.

8 Counsel cited it, and I'm surprised that you took note
9 of it, but I'm very familiar with the Collection Group,
10 LLC vs. Cook case because, as you probably both know,
11 that was my case. I watched that matter proceed to
12 Division III carefully. I also watched as there was a
13 request for it to go to the Supreme Court.

14 But what's somewhat remarkable, if you read the
15 case -- and actually if you want to pull the superior
16 court file and read the underlying fact pattern in the
17 superior court level, the fact pattern in the Cook case
18 that I heard is remarkably similar to this particular
19 action. And my decision to deny a request to set aside a
20 judgment pursuant to CR 60 was affirmed by Division III
21 in that instance and the Supreme Court declined review.
22 And that was also the case with this Court's decision to
23 award fees, again, in remarkably similar circumstances.

24 So for all these reasons, the Court is satisfied that
25 the plaintiff's request for fees in the amount of

1 \$13,384.97 are well-supported, they're appropriate under
2 the circumstances under a lodestar analysis, which would
3 include an understanding of whether the hourly rate is
4 appropriate, whether it's reasonable within the legal
5 community, whether it is appropriate given the
6 complexities of the case that were presented and the
7 issues that were brought before the Court. I'm satisfied
8 that those fees are appropriate and I'll grant the same
9 to the plaintiffs today.

10 And, Counsel, I didn't see a proposed order from
11 either side, but it could be I just missed it in all the
12 pleadings.

13 MS. ASAN: Your Honor, I have an updated one that I
14 can present to the Court.

15 THE COURT: Why don't you do me a favor, Counsel, and
16 let Mr. Miller look it over --

17 MS. ASAN: Sure.

18 THE COURT: -- and see if it works. I'll step off the
19 bench and get ready for -- we're about to be interrupted
20 by a bunch of transport officers that are going to show
21 up here in a minute.

22 MS. ASAN: Okay.

23 THE COURT: Take a look at the order, Counsel, and see
24 if you can agree. Otherwise I'll get it signed for you
25 so you can get on your way.

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MS. ASAN: Thank you, Your Honor.

THE COURT: Thank you so much, Counsel. Have a good day.

MS. ASAN: You too.

(Proceedings adjourned.)

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C E R T I F I C A T E

I, TERRI ROSADOVELAZQUEZ, do hereby certify:

That I am an Official Court Reporter for the Spokane
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That the foregoing proceedings were taken on the date
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direction.

I do further certify that I am not a relative of,
employee of, or counsel for any of said parties, or
otherwise interested in the event of said proceedings.

WHEREBY, I hereby affix my hand and seal, dated this 5th
day of March 2018.

TERRI ROSADOVELAZQUEZ, CSR 3070, RPR
Official Court Reporter, Dept. 10
Spokane County, Washington